

CERTAINTY ABOUT SURROGACY

Lize Mills*

BA (Law) LLB LLM

Senior Lecturer, Department of Private Law, University of Stellenbosch

1 Introduction

Prior to the coming into operation of Chapter 19 of the Children's Act 38 of 2005 ("the Children's Act") on 1 April 2010, no legislation existed which expressly addressed or regulated the issue of surrogacy in South Africa.¹ Although it was never explicitly prohibited, the basic philosophy apparently used to approach surrogacy was to test "the various issues against the prevailing *boni mores*".² It appears that altruistic surrogacy was allowed³ but commercial surrogacy was regarded as *contra bonos mores* since surrogate motherhood was not considered to be an "ideal way ... to create a family",⁴ and the exchange of money for the adoption of a child was,⁵ and still is,⁶ prohibited. The reality was that infertile couples and surrogate mothers entered into both altruistic and commercial surrogacy agreements on a regular basis, mainly due to the many advantages surrogacy was seen to hold over the adoption procedure.⁷ The legal relationship between the parties involved remained one of uncertainty and, subsequent to an order by the North Gauteng High Court in 2009, confusion. This note aims to briefly explain the background to this order and to evaluate it in view of the legal position applicable at the time. It will furthermore discuss the possible implications of this order as well as the amendments to the law which came into effect with the commencement of Chapter 19 of the Children's Act. It is argued that these provisions and the

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¹ For a more detailed discussion of the background to the inclusion of the final provisions in the Children's Act, see Louw "Surrogate Motherhood" in Davel & Skelton (eds) *Commentary on the Children's Act Original Service* (2007) 19-3-19-6; South African Law Commission (SALC) *Report and Draft Children's Bill on the Review of the Child Care Act Project 110* (2002) 163-170 and the authorities cited there

² Lupton "The Effect of the *Baby M* Case on Commercial Surrogacy" 1991 *TSAR* 224-229

³ Applying the rule of interpretation of "that which is not prohibited, is permitted", altruistic surrogacy agreements were accepted because it did not fall foul of any provisions of South African legislation. However, it is doubtful that in circumstances where one of the parties to an altruistic surrogacy agreement wanted to withdraw from such contract, a Court would have enforced the terms of the agreement and in all probability would still have found such an agreement to be *contra bonos mores*. Louw "Surrogate Motherhood" in *Commentary on the Children's Act* 19-4 states that a surrogacy agreement was seen to constitute "a possible devaluation or distortion of the concept of the family and the marriage relationship". See also Lupton 1991 *TSAR* 224-232

⁴ Lupton 1991 *TSAR* 230

⁵ In terms of s 24 of the Child Care Act 74 of 1983 ("the Child Care Act")

⁶ In terms of s 249 of the Children's Act no person may give or receive any consideration, in cash or in kind, for the adoption of a child. Payments in respect of surrogacy are prohibited in terms of s 301(1) of the Children's Act, subject to certain exclusions listed in s 301(2) and (3) of the Act

⁷ Lupton "The Right to be Born: Surrogacy and the Legal Control of Human Fertility" 1988 *De Jure* 36. Some of these advantages include the fact that the waiting period for a baby is shorter, the child is biologically related to at least one of the commissioning parents, and they may choose the surrogate mother

certainty which they provide to the parties involved in a surrogacy relationship are much needed and long overdue.

2 Surrogacy in South Africa before the Children's Act

Artificial fertilisation was, and still is today, regulated by the Human Tissue Act 65 of 1983 and its regulations.⁸ The legal relationship and the parental responsibilities and rights of the persons involved were, prior to the coming into operation of Chapter 19 of the Children's Act, regulated by the Children's Status Act.⁹ In terms of the Latin maxims *mater semper certa est*¹⁰ and *pater est quem nuptiae demonstrant*¹¹ which received statutory recognition in section 5 of the Children's Status Act,¹² the mother who gave birth to a child, and her husband if she was married, were regarded as the parents of that child. This meant that the commissioning persons in a surrogate relationship could only become the legal parents of such a child if they followed the adoption procedure in terms of the Child Care Act. In terms of section 5(1)(b) of the Children's Status Act, it was presumed that, if a surrogate mother was married, both she and her husband consented to the artificial fertilisation¹³ and the child born of such fertilisation was therefore deemed to be their legitimate child.¹⁴ Section 5(2) of the Children's Status Act provided that no right, duty or obligation would arise between the child and the genetic donor(s).¹⁵ This meant that, in circumstances where a surrogate mother had changed her mind and no longer wished to give her consent to the adoption of the baby by the commissioning person(s), she was entitled to do so since the surrogate agreement would in all probability have been considered to be *contra bonos mores*. This was the case even in instances where both the commissioning persons were the genetic parents of a child.

⁸ These regulations were published under GN R1182 in GG 10283 of 1986-06-20 and amended by GN R1354 in GG 18362 of 1997-10-17

⁹ Children's Status Act 82 of 1987 ("the Children's Status Act")

¹⁰ Loosely translated as "(the identity of) the mother is always certain"

¹¹ Which can be translated as "the father is whom the marriage indicates"

¹² S 5(1)(a) of the Children's Status Act previously provided that:

"Whenever the gamete or gametes of any person other than a married woman or her husband have been used with the consent of both that woman and her husband for the artificial fertilisation of that woman, any child born of that woman as a result of such artificial fertilisation shall for all purposes be deemed to be the legitimate child of that woman and her husband as if the gamete or gametes of that woman or her husband were used for such artificial fertilisation"

¹³ S 5(3) of the Children's Status Act provided that:

"artificial fertilisation", in relation to a woman—

(a) means the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of that woman; or
(b) means the placing of the product of a union of a male and a female gamete or gametes which have been brought together outside the human body in the womb of that woman, for the purpose of human reproduction;
'gamete' means either of the two generative cells essential for human reproduction "

¹⁴ S 5(1)(a) of the Children's Status Act

¹⁵ Except in cases where: "(a) that person is the woman who gave birth to that child; or (b) that person is the husband of such a woman at the time of such artificial fertilisation".

In instances where the surrogate mother gave her consent to the adoption of the child, the procedure in terms of Chapter 4 of the Child Care Act regulating the adoption process, had to be followed. The effect of an adoption order, granted by a Children's Court, was that all rights and obligations existing between the child and any person who was his parent immediately prior to the adoption, and such parent's relatives, were terminated.¹⁶ Prior to the decision of the Constitutional Court in *Du Toit v Minister of Welfare and Population Development*¹⁷ in 2002 this adoption procedure was not an option for a homosexual couple who entered into an agreement with a surrogate mother and wanted to adopt a child jointly. The only other alternative would have been to approach the High Court in its capacity as upper guardian of all minors for an order granting guardianship or custody or access to the child and the possibility that the parental rights of the surrogate mother and her husband would have remained intact, was a real one. Such an order could, of course, never give a homosexual couple the same rights as those which would flow from an adoption order granted to a heterosexual couple.

It became increasingly clear that the need for regulation of surrogacy was vital in a society where it was a practice used by all racial groups.¹⁸ Surrogacy was no longer regarded as a "last-resort alternative",¹⁹ and the notion that it should only be available to heterosexual couples using only married women as surrogate mothers became outdated.²⁰ The South African Law Commission²¹ sought to address this inadequacy in the law by consolidating various role-players' written submissions, by conducting public hearings and by considering comparative best practices from the United Kingdom and the United States of America.²² The final provisions included in Chapter 19 of the Children's Act are thus a result of a range of thorough investigations which also included the Law Commission's *Report on Surrogate Motherhood Project 65* in 1993 and its 2002 Discussion Paper on the *Report and Draft Children's Bill on the Review of the Child Care Act Project 110*.

3 The order and implications of case no 30972/2009

Despite these attempts at legislative reform, surrogacy remained floundering in unregulated and murky waters of uncertainty. The waters, however, became

¹⁶ As stipulated in s 20 of the Child Care Act

¹⁷ *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 2 SA 198 (CC) It was found that s 17 of the Child Care Act was unconstitutional since it excluded partners in same-sex life partnerships from adopting children jointly

¹⁸ See for example the chairperson of the select committee quoted by Sloth-Nielsen & Van Heerden "Putting Humpty Dumpty back together again: Towards restructuring Families' and Children's Lives in South Africa" 1998 *SALJ* 156 164 as saying:

"Surrogacy is practiced within all black groups on an informal basis. Many cultures demand that a child be born of a marriage and people desire genetically linked children. In many customs the elders get together to arrange for someone to give birth for an infertile woman. It also happens that a man is found to assist where a husband is infertile"

¹⁹ Sloth-Nielsen & Van Heerden 1998 *SALJ* 164

²⁰ Sloth-Nielsen & Van Heerden 1998 *SALJ* 164

²¹ As it then was, now referred to as the South African Law Reform Commission

²² Louw "Surrogate Motherhood" in *Commentary on the Children's Act* 19-5

a marshland when, on 23 June 2009 the North Gauteng High Court made the following order in case no 30972/2009:

- “1. That the Surrogate motherhood agreement (Annexure “D” hereto) be confirmed by this Court.
2. That terminating the parental power of the 3rd & 4th applicants accorded to them by the Children’s Status act 82 of 1987 and, notwithstanding any other law to the contrary, conferring guardianship upon the 1st & 2nd applicants.
3. That directing parentage, between the child(ren) born of surrogacy and the intended parents (1st & 2nd applicants), should be established from the time of birth of the child(ren), having effect that the adoption procedure be obviated.”

Media reports suggest that the order was granted following an application by a Pretoria couple in anticipation of the artificial fertilisation of a surrogate mother. The couple was seeking the assurance that they, apparently being the genetic parents, and not the surrogate mother, would be regarded as the legal parents of a child, still to be artificially conceived.²³ The couple questioned the legislation which required the commissioning parents to first adopt the child after birth and consequently sought “to change the way surrogacy is being regulated in South Africa.”²⁴ The Court, per Rabie J, only made the preceding order available and gave no reasons for its decision.

Upon a closer inspection of the order granted by the Court in the above matter, it becomes clear that there are a number of points of concern which need to be addressed. The first of these is the fact that, when in clause 2 of the order the Court terminated “the parental power of the 3rd & 4th applicants accorded to them by the Children’s Status [A]ct 82 of 1987”, the Court did so in terms of legislation which, at that stage, had been repealed. With the commencement of certain parts of the Children’s Act in July 2007, the whole of the Children’s Status Act was repealed in terms of section 313 read with item 5 of Schedule 4 of the Children’s Act. There could, therefore, be no “parental power”²⁵ conferred upon any person in terms of the Act of 1987. Furthermore, if it is assumed that the Court was in its order trying to refer to section 5 of this repealed Act, it also needs to be stressed that section 40 of the Children’s Act came into operation on 1 July 2007 and this provision is partly a recast of section 5 of the Children’s Status Act.²⁶ In terms of section 40(2) of Act 38 of 2005 the common law presumption, *mater semper certa est*, is confirmed in that it provides that “[s]ubject to s 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.” Section 40(3) of the Children’s Act furthermore states that

“[s]ubject to s 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when –

- (a) that person is the woman who gave birth to that child; or

²³ Govender “Surrogates no longer Legal Parents” *The Times* (2009-06-27) http://www.timeslive.co.za/sundaytimes/article82588_ece (accessed 16-11-2010)

²⁴ Govender *The Times* (2009-06-27)

²⁵ It is furthermore submitted that the term “parental power” had, by the time of the order, also become an outdated term which was no longer in use

²⁶ As discussed above at 2 where the position prior to the Children’s Act was explained

(b) that person was the husband of such woman at the time of such artificial fertilisation.”

Since neither section 296, nor section 297 of the Act was, however, in force at the time when the order was granted, the mother who gave birth to a child and her spouse, if she were married, still remained the parents of that child. The Court’s order in terms of clause 2 was therefore of no force and effect and the 3rd and 4th applicants in the matter would still be regarded as the legal parents of any child(ren) born from their surrogacy agreement with the 1st and 2nd applicants.

A second aspect which must be highlighted is the fact that the Court, once again in terms of clause 2 of the order, conferred only “guardianship upon the 1st & 2nd applicants”. In terms of section 18 of the Children’s Act, which came into force on 1 July 2007, the parental responsibilities and rights which a person may have in respect of a child “include the responsibility and right - (a) to care for the child; (b) to maintain contact with the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child.”

It is therefore clear that guardianship is only one aspect of the responsibilities and rights which a person may have in respect of a child. The Court did, however, in clause 3 of the order, direct that “parentage, between the child(ren) born of surrogacy and the intended parents (1st & 2nd applicants), should be established from the time of birth of the child(ren),” therefore apparently implying that the common law “state or relationship of being a parent”²⁷ would be established between the child born from the surrogate agreement and the commissioning parents. Whether this relationship would include aspects such as care, contact and maintenance is not clear and it can only be assumed that this is what the Court had implied by the order. It must, however, be pointed out that, in terms of the common law, the aspect of contributing to the maintenance of the child, exists quite independently of parental authority.²⁸

A further aspect of the application and the order granted which is of concern is the fact that the applicants approached the High Court for an order which would grant them guardianship and in this way bypassed the statutory prescribed adoption procedure in terms of which an adoption order may only have been granted by a Children’s Court. In the matter of *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)*²⁹ where a couple sought an order from the High Court granting them sole custody and guardianship of an abandoned baby girl, the Constitutional Court found that the High Court, in its capacity as upper guardian of all minor children, had not been dispossessed of its jurisdiction to make such an order.³⁰ However, the High Court could only grant such an order in *exceptional* cases where it could be said that to follow the adoption procedure in the Children’s Court would not be in the child’s best interests.³¹

²⁷ See also “Parentage” *Merriam-Webster Online Dictionary* (2009) <http://www.merriam-webster.com/dictionary/parentage> (accessed on 04-09-2009)

²⁸ Cronje & Heaton *South African Family Law* 2 ed (2004) 291

²⁹ 2008 3 SA 183 (CC)

³⁰ Para 31

³¹ Para 32 The Court did not provide any examples of conditions which would constitute exceptional circumstances

The Court held that the question was not one of the High Court's jurisdiction but one of how its jurisdiction should be exercised.³² In the particular instance before the Court, the Constitutional Court found that referring the matter to the Children's Court would have ensured that there would be safeguards and appropriate procedures to protect the baby girl, "something that a sole custody and sole guardianship order would not achieve."³³ The appeal was therefore upheld and the matter referred to the Children's Court on an expedited basis.³⁴

In the matter before the North Gauteng High Court in case no 30972/2009 it is not clear why the Court decided that the adoption procedure could have been disregarded. Since the Court made no reasons for its decision available, it remains a mystery as to how and why the Court could decide to change the then applicable legal position and circumvent the legislation which was still in place. Even if the Court considered the fact that the provisions of Chapter 19 of the Children's Act would eventually have come into operation and therefore negate an adoption procedure in terms of the Child Care Act, one is still left with the question as to how the Court could at this stage disregard the provisions of effective national legislation. Assuming that the High Court did so in its capacity as upper guardian of all minors, it is unclear as to why this matter was one of exceptional circumstances. More importantly, the Court did not explain if and how it considered the best interests of the child(ren) still to be born in this particular instance. This is particularly worrying since the constitutional imperative contained in section 28(2) of the Constitution compels all Courts to consider, in all matters pertaining to the child, her best interests to be of paramount importance. Furthermore, there have been numerous instances where the Courts have held that legislative reform is best left to the Legislature.³⁵ The Courts should not attempt to construct new portions of piecemeal legislation, nor may they ignore the applicable provisions of the law. The fact of the matter is that, although section 297 of the Children's Act³⁶ effectively also negates the adoption procedure, the legal position at the time of the court order remained that the maxim *mater semper certa est* applied. No Court may, and especially without providing reasons for its decision, evade the provisions of legislation still in place unless it is found to be unconstitutional.³⁷ The Court could not be asked, nor did it have the power, "to change the way surrogacy is being regulated in South Africa."³⁸

³² Para 34

³³ Para 33

³⁴ Para 63, read with para 17

³⁵ This is in line with the principle of the separation of powers in a constitutional democracy. See for example *South African Association of Personal Injury Lawyers v Heath* 2001 1 SA 883 (CC) para 22; *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 4 SA 501 (SCA) para 3; *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)* 2007 2 SACR 435 (CC) para 33; *S v Mshumpa* 2008 1 SACR 126 (EC) 152 para 65

³⁶ In terms of this provision any child born from a surrogate mother who entered into a valid surrogate motherhood agreement will be for all purposes regarded as the child of the commissioning parent(s) from the moment of the birth of that child

³⁷ In such circumstances, however, the Court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency in terms of s 172(1)(a) of the Constitution of the Republic of South Africa, 1996

³⁸ Govender *The Times* (2009-06-27)

This could only happen with the coming into operation of Chapter 19 of the Children's Act.

4 Changes to the law in terms of the Children's Act 38 of 2005

The South African Law Commission in its *Report and Draft Children's Bill on the Review of the Child Care Act* acknowledged that the most important question concerning a legal, moral, religious and philosophical issue such as surrogacy is to determine the parental responsibilities and rights of parties involved.³⁹ The provisions of Chapter 19 of the Children's Act therefore aim to address these issues by stipulating the legal requirements of a valid surrogate motherhood agreement; the effect of a valid surrogate agreement; the termination of the surrogate motherhood agreement; the effect of the termination of the agreement; and prohibitions relating to surrogacy.⁴⁰

In terms of the Act, in order for a surrogate motherhood agreement to be considered valid, it must be in writing, the agreement must be confirmed by the High Court⁴¹ and the written consent of the spouse⁴² or partner of both the commissioning parent(s) and the surrogate mother must be obtained.⁴³ Section 295 of the Act further provides that, in order for the Court to confirm the agreement, both the commissioning parents and surrogate mother must be competent to enter into the agreement. The agreement must also include adequate provisions for all aspects of the general welfare of the child, including the care, contact and upbringing of the child, as well as the child's position in the event of the death of the commissioning parents or of one of them, on their divorce or separation before the birth of the child and above all, provisions that satisfy the Court that the best interests of the child have been considered. The agreement must furthermore first be confirmed by the Court before the surrogate mother is to be artificially inseminated and she may not be artificially fertilised after the lapse of eighteen months from the date of the confirmation of the agreement by the Court.⁴⁴ In terms of section 303 of the Act it is furthermore a criminal offence to artificially fertilise a woman or to render assistance in such artificial fertilisation unless this is authorised by the Court in terms of the Act.

Since the coming into operation of section 297, any child born from a surrogate mother who entered into a valid surrogate motherhood agreement⁴⁵ will be for all purposes regarded as the child of the commissioning parent(s)

³⁹ SALC *Report and Draft Children's Bill on the Review of the Child Care Act* 160 para 7.5

⁴⁰ See also Louw "Surrogate Motherhood" in *Commentary on the Children's Act* 19-6-19-7

⁴¹ S 292 of the Children's Act

⁴² Although the Children's Act constantly refers to the "husband" of the surrogate mother, it is submitted that Louw is correct in stating that, since a surrogate mother may now also, in terms of the Civil Union Act 17 of 2006 marry another woman, the provision should be amended to read "spouse" Louw "Surrogate Motherhood" in *Commentary on the Children's Act* 19-10 This note will therefore consistently refer to the "spouse" of the surrogate mother

⁴³ S 293 of the Children's Act

⁴⁴ S 296

⁴⁵ In terms of s 297(2) of the Children's Act, any agreement which does not comply with the provisions of the Act is invalid and any child born from such an arrangement is for all purposes deemed to be the child of the woman that gave birth to that child, thus giving effect to s 40(2) of the Children's Act and the common law maxim *mater semper certa est*

from the moment of the birth of that child.⁴⁶ The surrogate mother must hand over the child to the commissioning parent(s) as soon as is reasonably possible⁴⁷ and neither she, nor her spouse, partner or relatives has any rights of parenthood or care of the child.⁴⁸ Contact between the child and the surrogate parents may, however, be established through the terms of the agreement.⁴⁹

The Act provides for “full”⁵⁰ or “partial” surrogacy in that a surrogate agreement may contemplate the artificial fertilisation of a surrogate mother using the reproductive cells of both the commissioning parents,⁵¹ or “if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents”.⁵² In the case of “partial” surrogacy, the surrogate mother may, at any time prior to the lapse of a period of 60 days after the birth of the child, terminate the surrogate agreement by filing a written notice with the Court.⁵³ This means that in these cases, the acquisition of parental responsibilities and rights of the commissioning parent(s) are postponed until the lapse of this “cooling-off period” and the surrogate mother may during these 60 days still decide to withdraw from the contract and keep the child.⁵⁴ The Court may then confirm the termination of the agreement and issue any appropriate order that is in the best interests of the child.⁵⁵ In terms of section 299 of the Act, the effect of this type of termination of the agreement is that the parental rights to the child will vest in the surrogate mother and her spouse or partner, if any, or if none, the commissioning father. The commissioning parents may only establish any such rights to parenthood through means of adoption and the child has no claim for maintenance or of succession against the commissioning parents or their relatives. In the case of a “full” surrogacy agreement, the valid surrogate motherhood agreement will confer full parental responsibilities and rights on the commissioning parents from the moment of birth and the surrogate mother may not terminate the agreement. The surrogate mother may, however, terminate the pregnancy in terms of the Choice on Termination of Pregnancy Act 92 of 1996 but she must consult and inform the commissioning parents of her decision prior to the termination.⁵⁶

⁴⁶ S 297(1)(a) of the Children’s Act

⁴⁷ S 297(1)(b)

⁴⁸ S 297(1)(c) Nor, in terms of s 297(1)(f), does the child born in terms of this agreement have any claim for maintenance or of succession against the surrogate mother, her spouse or partner or any of their relatives

⁴⁹ S 297(1)(d)

⁵⁰ Or “gestational” surrogacy

⁵¹ Establishing “full” surrogacy

⁵² S 294 of the Children’s Act, establishing “partial” surrogacy

⁵³ S 298(1) In terms of s 298(3), read with s 301 of the Children’s Act, the surrogate mother incurs no liability to the commissioning parents for exercising her rights of termination, except for compensation for any payments made by the commissioning parents such as medical and insurance expenses and loss of earnings suffered by the surrogate mother due to the agreement

⁵⁴ Louw “Surrogate Motherhood” in *Commentary on the Children’s Act* 19–25

⁵⁵ S 298(2) of the Children’s Act

⁵⁶ S 300 of the Children’s Act In circumstances where the decision to terminate the pregnancy is made for any reasons other than medical grounds, in terms of s 300(3), read with s 301 of the Act, the surrogate mother incurs no liability to the commissioning parents for exercising her rights of termination, except for compensation for any payments made by the commissioning parents such as medical and insurance expenses and loss of earnings suffered by the surrogate mother due to the agreement

5 Conclusion

Since it is not yet clear how many surrogacy agreements have been entered into in terms of the Act and confirmed by the High Court and there have not yet been any reported cases in this regard, the practical effect of Chapter 19 of the Children's Act still remains to be seen. As with any piece of legislation, certain questions of interpretation may arise and practical implications may not have been adequately addressed by the Act. However, from the discussion of the previous unsatisfactory position, and especially from the very confusing message sent out by the Court in case no 30972/2009, the coming into operation of the amendments are to be welcomed. It can of course be argued that the implications of the order granted by the North Gauteng High Court is now merely of academic interest since the reform which was brought about by the Children's Act on 1 April 2010, has radically altered the legal effects of surrogate motherhood in South Africa. However, it must be borne in mind that the Children's Act did not come into force with retrospective effect and should any children have been conceived and have been born from the surrogate agreement between the applicants in case no 30972/2009, the position remains that the surrogate mother and her husband are the parents of such children. Furthermore, it is also of concern that, because the facts of this case and the alleged effect of the order were so widely reported in the media,⁵⁷ a number of people could have entered into surrogacy agreements during the period from 24 June 2009 to 1 April 2010 believing that the commissioning persons would automatically be regarded as the parents without first following the adoption procedure in terms of the Child Care Act. One can only hope that there is now certainty among the public, legal practitioners and the Bench that Chapter 19 of the Children's Act is of full force and effect.

SUMMARY

With the recent coming into operation of Chapter 19 of the Children's Act 38 of 2005 on 1 April 2010, the previous legal position relating to surrogacy has been completely altered. Prior to the commencement of these provisions of the Act, commissioning persons in a surrogacy relationship had to adopt the artificially conceived child in terms of the Child Care Act 74 of 1983. In June 2009, at a time when the Child Care Act was still in force, the North Gauteng High Court found, *inter alia*, that the adoption procedure may be ignored and that the commissioning parents will automatically be regarded as the child's parents. The Court provided no reasons for its decision. Since the most important question in a legal, moral, religious and philosophical issue such as surrogacy is to determine the parental responsibilities and rights of the parties involved, it was of the utmost importance that the previous unsatisfactory and confusing position be clarified. This note aims to explain the background to the Court's order and to evaluate the decision in view of the legal position applicable at the time. It also discusses the possible implications of this order as well as the certainty which the amendments to the law, in terms of Chapter 19 of the Children's Act, will hopefully bring.

⁵⁷ See for example the title of the report in *The Times* newspaper (as referred to in fn 25): "Surrogates no longer legal parents" (Govender *The Times* (2009-06-27))